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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAFAEL CASAS et al.,<br><br>Defendants and Appellants. | B158825<br><br>(Los Angeles County<br>Super. Ct. No. NA045720) |

Appeal from judgments of the Superior Court of Los Angeles County. Arthur Jean, Judge. Affirmed.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Rafael Casas.

Kathy M. Chavez, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Jimenez Lopez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jeffrey B. Kahan and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jaime Lopez was convicted of 33 crimes. He challenges the sufficiency of the evidence to support five of the convictions. He also argues that the trial court's failure to sua sponte instruct the jury on brandishing a firearm requires reversal of his three convictions for assault with a firearm.

Appellant Rafael Casas Jr. was tried with Lopez and was convicted of 21 crimes. He argues that reversal of his convictions is required because his trial counsel's failure to request severance of the counts that involved only Lopez constituted ineffective assistance of counsel.

We find no error and affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

On February 28, 2001, Lopez was charged with 36 crimes and numerous enhancements stemming from three separate robberies, two of which also involved either attempted murder or murder. Two counts against Lopez were dismissed. The same information charged Casas with 21 crimes and numerous enhancements arising out of two of the three robberies. In this section, we briefly describe the three robberies. We provide additional facts in the Discussion section to analyze Appellants' specific claims of error.

*Cajero Robbery*

On February 21, 2000, Lopez and two other men entered the Cajero house and ordered the people inside to give them money, jewelry, and other personal items. Each assailant had a gun, and Lopez wore blue latex gloves. Benjamin Cajero Sr., Maria, Elvira, Eric, Carina, Steve, and Lissette Carejo, and Cindy Deanda were inside the house when the assailants arrived. Benjamin Cajero Jr. (Benjamin) and Antonio Acosta initially

were in the garage but later entered the house.[1] Benjamin fled when he saw Lopez holding a gun. Shots were fired and Acosta was wounded.

The jury found Lopez not guilty of the attempted murder of Acosta. Lopez was convicted of six counts of robbery in concert in an inhabited dwelling, two counts of attempted robbery in concert in an inhabited dwelling, and two counts of assault with a firearm. Lopez was convicted of the attempted murder of Benjamin. Lopez also was found to be a felon in possession of a firearm.

*Lopez Robbery*

On May 30, 2000, Lopez, Casas, and Oscar Ramirez entered the residence of Teresa and Francisco Lopez. All three assailants had guns and all three wore blue latex gloves. Teresa, Francisco, and Irma Lopez; Raul, Terry, Michael, and Jennifer Pacheco; Jose Gonzales; Heraclio, Judith, Erik, and Jennifer Pantoja were either inside the house or the garage.

Lopez said "everybody throw yourself on the floor." Casas told Ramirez to tape the victims' hands. Lopez and Casas took money and jewelry. Francisco and Ramirez were killed during the course of the robbery.

Before leaving the scene, either Casas or Lopez pointed a pistol at Jose Becerra, a neighbor, and shot. The bullet hit a mailbox about ten to twelve feet from Becerra.

Jessie Pintueles, another neighbor, heard gunshots and ran towards the scene of the shootings. Pintueles saw two men – one was shooting at the house and the other was coming out of the house. One of the men pointed a gun at Jesse and told him to get down.

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[1] Because several victims share the same last name, we refer to them with their first name. In addition, when we refer to Lopez, the reference is to Jaime Lopez. However, when we refer to the Lopez robbery, it is to the robbery of the residence of Teresa and Francisco Lopez.

Lopez and Casas were convicted of six counts of attempted robbery in concert in an inhabited dwelling and one count of robbery in concert in an inhabited dwelling and one count of assault with a firearm. The jury found both Lopez and Cases guilty of attempted premeditated and deliberate murder and two counts of first degree murder. Both were found to be felons in possession of a firearm.

*L.A. Nails*

On July 11, 2000, holding guns, Lopez and Casas entered L.A. Nails in Long Beach.[2] Lopez ordered those inside to "empty out pockets and give us what you have, money, jewelry, purses, phones." Lopez and Casas took jewelry and money from several victims.

Lopez and Casas were pursued by police as they fled L.A. Nails. When the police activated their lights and siren, Lopez accelerated. Lopez eventually lost control of his vehicle and collided into a house. Lopez and Casas fled the car. Lopez was found underneath a car in a nearby driveway, and Casas was found in the closet of a nearby empty apartment. Jewelry, blue latex gloves, and two nine-millimeter semiautomatic pistols were later recovered from the vehicle Lopez was driving. Each firearm had a round chambered in the pistol.

Lopez and Casas each was convicted of three counts of attempted second degree robbery and four counts of second degree robbery. Lopez and Casas each was convicted of fleeing an officer and of being a felon in possession of a firearm.

Appellants timely appealed.

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[2] There was also testimony that only Lopez had a gun.

## CONTENTIONS

Lopez challenges the sufficiency of the evidence of several counts and argues that the trial court should have sua sponte instructed the jury on brandishing a firearm, which Lopez maintains is a lesser included offense of assault with a firearm. Casas argues that his trial counsel was ineffective because counsel did not move to sever the Cajero robbery from the other counts.

## DISCUSSION

### *I. Sufficiency of the Evidence*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

#### *A. Count 6 -- Attempted Second Degree Robbery of Thanh Huu Nguyen*

Lopez argues that there is not substantial evidence in support of his conviction for the attempted robbery of Thanh Huu Nguyen during the L.A. Nails incident.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will accomplished by means of force or fear." (Pen. Code § 211.) "The crime of attempt occurs when there is a specific intent to commit a crime and a direct but ineffectual act done towards its commission." (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764.) Multiple counts of attempted robbery are proper where a victim intends to rob more than one person and takes action beyond mere preparation. (*Id.* at p. 765.)

Lopez entered L.A. Nails and, holding a gun, told the people inside to empty their pockets and "give" Lopez and Casas money, jewelry, purses, and phones. Lopez and

Casas then "took one by one, everybody['s] [belongings]." Thanh Huu Nguyen was an employee of L.A. Nails and was present when Lopez and Casas entered the store.

Based on this evidence the jury could have inferred that Lopez intended to rob every person in the store including Thanh Huu Nguyen. "[M]ultiple counts of attempt can arise from a single act which goes beyond mere preparation. Such multiple counts are dependent, however, on demonstration of sufficient evidence to prove beyond a reasonable doubt that the offender had multiple purposes in accompanying the single act." (*People v. Bonner, supra,* 80 Cal.App.4th at pp. 766-767.) In the present case, there was sufficient evidence to prove beyond a reasonable doubt that Lopez had multiple purposes – the intent to rob each person in the store.[3]

*B. Counts 15 and 18 – Assault With a Deadly Weapon on Steve Cajero and Cynthia Deanda*

Lopez argues that there is not substantial evidence that he assaulted Steve Cajero or Cynthia Deanda with a firearm during the Cajero robbery.

The record indicates that Steve and Cynthia were in the living room when the three assailants entered the house. When the men told everyone to get on the floor, Steve laid down on the floor. Steve watched Lopez as Lopez pointed the gun at "other family members." No one specifically pointed a gun at Steve.

Assault is defined as "an unlawful attempt coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code § 240.) "[A]n assault occurs whenever """[t]he next movement would, at lest to all appearance, complete the battery."""" (*People v. Williams* (2001) 26 Cal.4th 779, 786, emphasis omitted.) In *People v. Schwartz* (1992) 2 Cal.App.4th 1319, the court found substantial evidence to support a conviction for assault with a firearm where the defendant entered a business

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[3] The fact that Thanh Huu Nguyen did not testify and that another witness was not certain about his name does not undermine the sufficiency of the evidence.

with a gun and ordered the employees to lie down on the floor. (*Id.* at pp. 1322-1325-1326.) The court held that the defendant "had the present ability to commit a violent injury on any of the employees." (*Id.* at p. 1326.)

This case is like *Schwartz*. Even though it is clear Lopez did not point the gun directly at Steve and there is no evidence Lopez pointed a gun directly at Cynthia, both victims were in the living room where Lopez was standing with a gun. Evidence that the victim was in range of the shooter is sufficient to support a conviction for assault with a firearm. (*People v. Colantuono* (1994) 7 Cal.4th 206, 219 "Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault."].) Although Lopez could not immediately shoot Steve or Cynthia, the conduct "is near enough to constitute 'present' ability for the purpose of an assault." (*People v. Ransom* (1974) 40 Cal.App.3d 317, 321.)

*C. Attempted Premeditated and Deliberate Murder Benjamin and Becerra*

Lopez challenges the sufficiency of the evidence of premeditated and deliberate murder of Benjamin and Becerra. Lopez does not dispute that there is sufficient evidence one of the assailants shot at these two individuals, but argues that (1) he was not the shooter because the jury found not true a personal discharge enhancement (12022.53, subd. (c)) and (2) he cannot be liable on an aider and abetter theory because there is not evidence that he intended to promote or encourage the attempted murders and the jury was not instructed on a natural and probable consequence theory.

We assume for purposes of argument that Casas was the shooter. Because the jury was not instructed on the natural and probable consequence theory with respect to the attempted murder charges, we must consider substantial evidence based only on specific intent to encourage an unsuccessful murder. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

*i. Count 21 – Attempted Murder of Benjamin Cajero Jr.*

Benjamin testified that he was in the garage of his parents' house with Antonio Acosta. Surprised that the door was locked, Benjamin looked through window and saw that everything was a mess and his wife was "laying there." When Elvira, Benjamin's sister, let him inside the house, Benjamin saw Lopez dressed in black holding a gun. Benjamin ran away towards the street. When Benjamin was in the driveway, he heard gun shots. Benjamin thought "the guy was shooting at Antonio or something." Antonio thought that "a man had ran and gunshots rang out." Maria Cajero testified that "somebody was firing at my son[,]" Benjamin. She "saw somebody firing from the truck and my son running pretty fast."

To aid an abet an attempted murder, a person must aid or encourage the perpetrator with knowledge of the perpetrator's intent to kill and with the intent of facilitating the killing. (*People v. Lee* (2003) 31 Cal.4th 613, 624.) While neither presence at the scene of a crime nor knowledge of, but failure to prevent the crime, is sufficient to establish aiding and abetting (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409), "'[t]he presence of one at the commission of a felony by another is evidence to be considered in determining whether or not he was guilty of aiding and abetting . . . '" (*People v. Moore* (1953) 120 Cal.App.2d 303, 306.) "[A]mong the factors which may be considered in making this determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' [Citation.]" (*People v. Campbell, supra,* 25 Cal.App.4th 402, 409, quoting (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

There is evidence that Lopez aided and abetted the shooting. The assailants acted together. Based on their coordinated activity, the jury could have inferred that the assailants planned to shoot at any victim who attempted to flee as Benjamin did. The jury could infer that Casas intentionally discharged a firearm with the intent to kill Benjamin because he was fleeing, a finding supported by Antonio's testimony that at least one of the assailants started shooting after Benjamin ran from the scene.

*ii. Count 34 – Attempted Murder of Jose Beccera*

Jose Becerra testified that he shared a driveway with Teresa and Francisco. After he heard shots, Becerra went outside. Becerra saw two men running towards the street and yelled "what's up." One of them pointed a gun at Becerra and fired a shot from about 25 to 30 feet away. The shot hit the mailbox. Irma Lopez testified that the shooter aimed directly at Becerra.

The record supports the finding that Lopez knew of Casas's criminal intent and intended to facilitated Casas's intended crime. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) Lopez and Casas each had guns and coordinated the invasion of Teresa and Francisco's home. The jury expressly found that the defendants acted in concert. From this coordination, the jury could infer that Casas and Lopez provided support and encouragement for each other in each of the crimes including the attempted premeditated murder. In addition, the jury could have inferred that Becerra's decision to call out to them prompted the shooting and that Lopez and Casas agreed in advance to shoot someone who constitutes a threat. Lopez and Casas arrived together, coordinated the robbery, and left together. The record supports the jury verdict.

*II. Alleged Instruction Error*

With respect to counts 15, 18, and 33, Lopez argues that the trial court had a sua sponte duty to instruction the jury on brandishing a firearm which he argues is a lesser included offense of assault with a firearm.

The trial court has a sua sponte obligation to give instructions on a defense when (1) defendant is relying on the defense or (2) there is substantial evidence supportive of the defense and when the defense is not inconsistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186; *People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds in *People v. Breverman, supra,* 19 Cal.4th at p. 165; see also *People v. Rios* (2000) 23 Cal.4th 450, 464.)

Although *People v. Wilson* (1967) 66 Cal.2d 749, 764 implied that brandishing a firearm is a lesser included offense of assault with a firearm, almost all of those cases that

squarely considered the issue rejected that conclusion. (See *People v. Steele* (2000) 83 Cal.App.4th 212, 218 and cases cited therein; *People v. Escarcega* (1974) 43 Cal.App.3d 391, 399-400.)[4] In *People v. Steele,* the court explained that brandishing a weapon is not a lesser included offense of assault with a deadly weapon because an assault with a deadly weapon may be committed stealthily, without a brandishing of the weapon. (*People v. Steele, supra*, 84 Cal.App.4th at p. 218.)

Even if we assume for the sake of argument that brandishing a firearm is a lesser included offense of assault with a firearm, Lopez has not demonstrated that the court was obligated to instruct on brandishing a firearm in this case. Lopez's theory of the case was misidentification, a theory inconsistent with the defense that he only brandished a weapon.

*III. Severance of The Cajero Robbery*

Casas was not charged in the February incident involving the Cajero home invasion. Casas argues that those counts should have been severed and his attorney rendered ineffective assistance of counsel by failing to request severance.

A defendant asserting a claim of ineffective assistance of counsel must demonstrate: (1) that counsel's performance fell below and objective standard of reasonableness and (2) that defendant suffered prejudice from the deficiency. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must

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[4] Cases that do not analyze the question have found that brandishing a weapon is a lesser included offense of assault with a firearm. (*People v. Carter* (1975) 48 Cal.App.3d 369, 372; *People v. Fuentes* (1986) 183 Cal.App.3d 444, 445.) These cases are not persuasive because the courts provide no rationale for their conclusions and no legal support for their statements.

overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Casas fails to show either deficient performance or prejudice.

If counsel had made a motion to sever the counts concerning the Cajero home invasion, the court would have considered whether the "(1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]'" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)[5] Casas would have borne the burden of clearly establishing a substantial danger of prejudice. (*Ibid*.)

Only the first factor is satisfied. Evidence of the Cajero robbery would not have been admissible against Casas because Casas was not involved in it. However, the absence of cross-admissibility, is not, standing alone sufficient to demonstrate prejudice. (*People v. Bradford, supra,* 15 Cal.4th at p. 1316.) The evidence of the Cajero robbery was not significantly more inflammatory than the evidence of the L.A. Nails robbery or the Lopez robbery. As the Attorney General points out, unlike during the Cajero robbery, two people were killed during the Lopez robbery. Casas argues that a weak case against

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[5] This case met the standard for joinder because all of the crimes were of the same class as required by Penal Code section 954. Penal Code section 954.1 provides: "In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact."

him was joined with a strong case against Lopez. This argument is not relevant to the severance motion he argues his trial counsel should have made because it relates to the counts that involved both Lopez and Casas. Finally, with respect to the last factor, the People did not seek the death penalty in this case. Because Casas could not have made a strong showing in support of a motion for severance, his counsel cannot be faulted in declining to bring that motion.

Moreover, counsel may have refrained from requesting severance for tactical reasons. Casas took advantage of the stipulation to the jury that he was not involved in the Cajero robbery, using as evidence that he was not involved in the Lopez robbery. Counsel also argued that Casas was misidentified and supported that argument with the following: "You know there was another home invasion robbery with several people involved. You know that my client was not there."

Casas also fails to show prejudice, the second prong of ineffective assistance of counsel. The court informed the jury that the parties stipulated Casas was not involved in the counts involving the Cajero robbery. The record reveals that Casas's attorney made an opening statement prior to the introduction of the people's case. He told the jury that his "client is not charged" and "has nothing to do with" the counts involving the Cajero robbery. While the evidence on the Carejo incident was introduced the trial court informed the jury as follows: "all counsel have informed me that they agree and stipulate that in the incident at the Cajero house, Mr. Casas was not involved." During closing argument, Casas attorney argued as follows: "There are three episodes that have been charged in this case. We have a stipulation that my client was not involved in one of them. . . . That leaves us with two episodes." In addition, based on the eyewitness identifications of Casas and the evidence that his fingerprint was in Lopez's vehicle that fled the scene of the L.A. Nails incident, it is not reasonably probable that Casas would have obtained a more favorable result if his trial counsel had moved for severance of the counts concerning the Cajero robbery.

## DISPOSITION

The judgments are affirmed.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.